(16,258.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 158.

BUILDING AND LOAN ASSOCIATION OF DAKOTA, APPELLANT,

vs.

M. S. PRICE ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 11, 1897.

1 *Caption.*

Be it remembered that at a term of the circuit court of the United States, in the fifth circuit thereof, and in and for the northern district of Texas, at Dallas, begun and holden at Dallas, Texas, on the 13th day of January, A. D. 1896, and which term adjourned on the 24th day of March, A. D. 1896—present and presiding, the Honorable Andrew P. McCormick, United States circuit judge for the fifth judicial circuit—upon and during the trial of the cause hereinafter named the following proceedings were had and the following cause came on for trial and was tried, to wit:

Style of Cause.

BUILDING AND LOAN ASSOCIATION OF DAKOTA
vs.
M. S. PRICE *et al.*
} No. 362. In Equity.

2 *Complaint.*

Filed Oct. 3, 1895.

In the Circuit Court of the United States for the Northern District of Texas, Holding Sessions at Dallas, Texas.

BUILDING AND LOAN ASSOCIATION OF DAKOTA
vs.
M. S. PRICE and H. M. PRICE *et al.*
} In Equity.

To the honorable judges of the circuit court in and for the northern district of Texas:

The Building and Loan Association of Dakota, a corporation duly and legally incorporated under and by virtue of the laws of the State of South Dakota, having its principal place of business in the city of Aberdeen, county of Brown and State of South Dakota, brings this its bill of complaint against M. S. Price and her husband, H. M. Price, and Bertha Rothschild, W. B. Luna, and Sophia Miller, all of whom are resident citizens of the State of Texas and of the county of Dallas, in said State.

And thereupon your orator, complaining, says that heretofore, on, to wit, on or about the first day of January, 1890, one Jacob Rothschild, now deceased, made application for membership in your orator's association and subscribed for forty shares of the capital stock thereof, which application was accepted, and on or about said first day of January, 1890, a certificate for said forty shares of the capital stock of your orator was by it duly issued and delivered to the said Jacob Rothschild, who paid the subscription or admission fee due thereon, which certificate was issued and delivered, and the said Jacob Rothschild accepted and received the same upon the terms and conditions therein set forth, and thereupon he became a

member of your orator and the owner and holder of forty shares of its capital stock.

3 2nd. Your orator further shows that according to the terms and conditions of said certificate of stock so issued and accepted by the said Jacob Rothschild he agreed and promised to pay to your orator on the first day of each and every month after its said date the sum of sixty cents (60 cts.) for each and every share so held by him until such shares shall become fully matured and of the value of one hundred dollars per share.

3rd. Your orator further shows that on or about the said first day of January, 1890, the said Jacob Rothschild, being then and there a stockholder in your orator and entitled under the rules, regulations, and by-laws to make application for an advancement on his said stock, made his application to your orator for an advancement of two thousand dollars in anticipation of the maturity value of his said forty shares of stock, and in competition with other bidders for the funds of your orator bid as a premium for the privilege of obtaining such advancement the sum of fifty dollars per share and offered as security for the continued payment *for* the monthly dues on said forty shares of stock and the interest on said advancement the real estate hereinafter described; and your orator further shows that said application and bid were made in accordance with the rules, regulations, and by-laws of said association and were duly accepted and approved by your orator's board of directors, and the advancement applied for was duly made, and the amount due thereon was duly paid to the said Jacob Rothschild; that said advancement was made by your orator on the faith and in the expectation that the said Rothschild would, according to his agreement, continue the monthly payment on his said forty shares of stock until such stock should have become fully matured and of the value of one hundred dollars per share.

4 4th. Your orator further shows that on or about the first day of February, 1890, the said Jacob Rothschild and the defendant Bertha Rothschild, for and in consideration of the advancement so made and for the purpose of securing the continued payment of the monthly dues on said stock, made, executed, and delivered to your orator and thereby promised and agreed to comply with the terms of a bond, of which the following is substantially a copy:

"Know all men by these presents, that Jacob Rothschild and Bertha Rothschild, his wife, of the county of Dallas, and State of Texas, — held and firmly bound unto the Building and Loan Association of Dakota, of the city of Aberdeen, and State of South Dakota, in the sum of four thousand ($4,000.00) dollars, lawful money of the United States of America, to be paid to the said association, its certain attorney, successors or assigns, at its home office in Aberdeen, South Dakota, to which payment well and truly to be made we bind ourselves and our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated at Aberdeen, South Dakota, this first day of February, one thousand, eight hundred and ninety.

The condition of this obligation is such that, whereas, said Jacob Rothschild has bid, in accordance with the by-laws of said association, the sum of two thousand (2,000) dollars, as and for a premium for the advancement to him by said association of two thousand dollars, by way of anticipation of the value, at their maturity of forty shares of the capital stock of said association, now owned by said Jacob Rothschild; and, whereas, said association has this day advanced to said Jacob Rothschild the sum of two thousand dollars, in consideration of said premium, and by way of said anticipation:

Now, therefore, if the above-bounden Jacob Rothschild and Bertha Rothschild their heirs, executors and administrators, or any of them, shall well and truly pay or cause to be paid unto the said association, its certain attorney, successors or assigns, at its home office, on or before nine years from date hereof, the just sum of four thousand dollars, as aforesaid, together with interest on two thousand dollars, at the rate of six per cent. per annum, from the first day of February A. D. 1890, until paid, payable monthly in advance; or shall well and truly pay, or cause to be paid, unto said association, its certain attorney, successors or assigns, at its said home office, the sum of twenty-four and $\frac{00}{100}$ dollars, on the first day of each and every month hereafter, as and for the monthly dues on said forty shares of capital stock of said association now owned by the said Jacob Rothschild and by him hereby sold, assigned, transferred and set over to said association as security for the faithful performance of this bond, and shall also well and truly pay, or cause to be paid, all installments of interest aforesaid, and all fines which become due on the said stock, without any fraud or further delay, until said stock becomes fully paid in and of the value of one hundred dollars per share, and shall then surrender said stock to said association; then, and in either of such cases, the above obligation to be void, otherwise of full force and virtue.

Provided, however, and it is hereby expressly agreed, that, if, at any time, default shall be made in the payment of said interest, or the said monthly dues on said stock, for the space of six months after the same, or any part thereof, shall have become due, or if the taxes, and assessments on the property mortgaged to secure the faithful performance of this bond, be not paid when due, or

6 if the insurance policy or policies on the said mortgage-property be allowed to expire without renewal, then, and in either or any such case, the whole principal sum aforesaid shall, at the election of said association, its successors or assigns, immediately thereupon become due and payable, and the sum of four thousand dollars, less whatever sum has been paid said association, as and for the monthly dues on said forty shares of said capital stock, at the time of said default, may be enforced and recovered at once as liquidated damages, together with and in addition to, all interest and fines then due, and all costs and disbursements, including said taxes, insurance and assessments, which have been paid by said

association, anything hereinbefore contained to the contrary notwithstanding.

(Signed) JACOB ROTHSCHILD. [SEAL.]
BERTHA ROTHSCHILD. [SEAL.]

Signed, sealed, and delivered in presence of—
W. L. HALL.
C. S. CRYSLER."

5th. Your orator would further show that on the first day of February, 1890, the said Jacob Rothschild and the defendant Bertha Rothschild, in order to better secure your orator for the money advanced by your orator as aforesaid and in all their agreements, obligations, and contract as aforesaid, made, executed, and delivered to your orator their certain mortgage or deed of trust, with power of sale, in which Chas. S. Crysler was made trustee, on the following-described tract or lot of land, situated in the city of Dallas, county of Dallas and State of Texas, and more particularly described as follows:

In the John Grigsby league and labor head-light survey, and being a part of a lot deeded to Margaret Crane by John S.
7 Hereford on the twentieth (20th) day of February, eighteen hundred and seventy-nine (1879), as per deed recorded in Book Forty-nine (49), pages three hundred thirty-nine and three hundred forty (339, '40), of the records of deeds, etc., of Dallas county, Texas, beginning at a point in the east line of Harwood street at the southern corner of said lot, deeded to said Margaret Crane by said John S. Hereford, thence north forty-five east with the south-east line of said lot one hundred forty (140) feet to corner; thence north forty-five west parallel to Harwood street fifty feet to corner; thence south forty-five west one hundred forty (140) feet to said northeast line of Harwood street; thence south forty-five east fifty (50) feet with said Harwood street to the place of beginning; which deed of trust was duly recorded on the eleventh day of March, 1890, in volume 42, page 195, of the Records of Mortgages and Deeds of Trust in Dallas county, Texas.

6th. Your orator would further show that it is recited in said deed of trust, among other things, that the said Jacob Rothschild is a member of the Building and Loan Association of Dakota and is the owner of forty shares of the capital stock thereof, the monthly payments of which amount *for* $24.00; and it is further recited that said deed of trust is given for the purpose of securing the aforesaid bond, the nature of which bond is fully set forth in said deed of trust.

7th. Your orator would further show that it is stipulated in said deed of trust that if the said defendants shall well and truly pay or cause to be paid the sum of four thousand dollars, together with the interest above specified, within the time and in the manner as in said bond specified, or shall pay or cause to be paid, at the
8 home office of said association, the installments of interest as they become due on said stock until said stock becomes fully

paid in and of the value of one hundred dollars per share, and before any of said installments of interest or monthly payments shall have been past due for a period of sixty (60) days, and shall then surrender said stock to said association in payment of said bond, and shall pay the taxes and assessments and shall keep and perform all and every of the conditions of said bond, then this deed shall be void and the property hereinbefore conveyed shall be released at the cost of the parties executing the said bond, but otherwise to continue in full force and effect; but if default be made in the payment of said sum or sums of money or any installment of interest thereon or of any monthly payment *or of any monthly payment* of stock for the period of sixty (60) days after the same shall be due or any part of either or in the payment of taxes at the time or times specified for payment or in any condition in said deed of trust contained, then or in either or any such case the whole principal sum or sums secured by this trust deed and the interest thereon accrued up to the time — such default shall, at the election of your orator, its successors or assigns or its or their agent, become thereupon due and payable immediately upon said default. Whereupon the trustee in said trust deed is authorized and empowered to sell said premises in accordance with the stipulations contained in said instrument, and with the proceeds of said sale to pay the expenses of sale and all sums of money due by the terms of said bond so in default, with all interest due thereon, and all taxes, if any, due to said association.

8th. Your orator further shows that said forty shares of stock have not been withdrawn, nor have they matured or become of the par value of one hundred dollars per share; that subsequent to the execution, delivery, and record of the aforesaid deed of trust the said Jacob Rothschild and Bertha Rothschild conveyed the aforesaid premises to the defendant Sophia Miller, who, as a part of the purchase price for said premises, assumed and agreed to pay the said bond in the sum of four thousand dollars, secured by the aforesaid deed of trust lien, retaining a vendor's lien in said deed of conveyance to secure the payment of the aforesaid sum of four thousand dollars; that subsequently the said Sophia Miller conveyed said premises in like manner to the defendant M. S. Price as her separate property, who, as a part of the purchase price therefor, assumed and agreed to pay said bond secured by said deed of trust lien, said Sophia Miller retaining a vendor's lien for the payment thereof and for the payment of other portions of the purchase-money, by virtue of which she may claim some interest in the aforesaid premises; that W. B. Luna also claims some interest in the aforesaid premises, which interest, if any, is subsequent and inferior to that of your orators.

Your orator further alleges that it is now the owner and holder of the said bond and deed of trust. Your orator further shows that the said defendants have not paid said principal sum of $4,000 nor any part thereof; that the said defendants have not continually paid the monthly dues on said forty shares of stock nor the monthly installments of interest as provided in said bond, but that defend-

ants have paid no part of said dues or interest except the sum of twelve hundred dollars ($1,200.00) as and for the said monthly dues for the months of February, 1890, to and including the month of March, 1894, and the further sum of $500.00 as and for the interest, as in said bond provided, for the months of February, 1890, to and including the month of March, 1894.

10 Your orator further shows that default has been made in the payment of the monthly dues on said forty shares of stock and the monthly installment of interest on said advancement; that more than six months have elapsed since the first monthly installment of interest and dues so in default became due and payable, and your orator elects to declare the whole sum named in and secured by said bond and deed of trust to be immediately due and payable.

9th. Your orator further shows that there is now due and owing your orator from Bertha Rothschild, Sophia Miller, H. M. and M. S. Price under and by virtue of the terms of said bond the sum of four thousand dollars ($4,000.00), less the sum of twelve hundred dollars ($1,200.00) paid to your orator as the monthly dues on said forty shares of capital stock at the time of the aforesaid default, aggregating $2,800.00, together with and in addition to interest on two thousand dollars, at the rate of six per cent. per annum, from April 1st, 1894.

10th. Your orator would further show that the said Chas. S. Crysler, trustee in the said deed of trust, has removed from the said county of Dallas and the State of Texas; that his whereabouts are unknown to your orator, and that he is unable to execute the trust according to the power conferred on him in said instrument.

Wherefore your orator files this its bill and prays your honors to grant *its* most gracious writ of subpœna, to be directed to the said M. S. Price, H. M. Price, Bertha Rothschild and Sophia Miller, commanding them personally to be and appear before your honors in this honorable court and to answer all and singular the premises, answer under oath being dispensed with, and to abide such order and decree therein as to your honors may seem meet.

Upon final hearing your orator prays for decree against the defendants M. S. Price, Bertha Rothschild, and Sophia Miller

11 for its aforesaid debt and said damages and costs of this suit and for a decree of foreclosure against all the defendants, and also against the defendants H. M. Price and W. B. Luna under the mortgage and vendor's lien on the above-described premises, and for an order of sale of the said premises, and for all such other and further relief as to your honors may seem just and proper, and for which your orator will ever pray.

C. W. STARLING,
Attorney for Complainant.

The foregoing has the following endorsement, to wit:

No. 362. Equity. Building & Loan Association of Dakota *vs.* M. S. Price *et al.* Complaint. Filed Oct. 3, 1895. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

12 *Amendment to Bill Making W. B. Luna a Respondent.*

Filed Jan. 20, 1896.

In the Circuit Court of the United States in and for the Northern District of Texas, at Dallas.

BUILDING & LOAN ASS'N OF DAKOTA
vs.
M. S. PRICE *et al.*
} Equity. No. 362.

And now comes the plaintiff and, with leave of the court first had and obtained, amends *his* bill of complaint herein as follows:

Add to paragraph 9 of said bill the following words: "Your orator further shows that W. B. Luna, a resident and citizen of the city and county of Dallas, claims some interest in the aforesaid premises, which interest, if any, is subsequent and inferior to the lien of your orator."

In paragraph 10 of said bill after the names of the other defendants insert the name "W. B. Luna."

C. W. STARLING,
Solicitor for Plaintiff.

The above-named defendant, W. B. Luna, comes now, by his attorney, T. E. Conn, and accepts service and enters his appearance herein, saving all rights as to time and manner of demurrer, plea, or answer.

T. E. CONN,
Solicitor for Defendant W. B. Luna.

Endorsement: Equity. No. 362. Building & Loan Ass'n of Dakota *vs.* M. S. Price *et al.* Amendment to bill making W. B. Luna part defendant. Filed Jan. 20, 1896. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

13 *Demurrer of W. B. Luna.*

Filed M'ch 2, 1896.

Circuit Court of the United States for the Northern District of Texas.

BUILDING AND LOAN ASSOCIATION OF DAKOTA
vs.
M. S. PRICE *et al.*
} In Equity.

The demurrer of W. B. Luna, one of the defendants, to the bill of the above-named complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein

set forth and alleged, doth demur to the said bill and for causes of demurrer showeth:

1. That it appeareth by the said bill on complainant's own showing that this court has no jurisdiction of the said bill nor the several subject-matters therein set forth nor of any of said matters.

2. That the bond exhibited in complainant's bill on page 3 of said bill and upon which said bill is sought to be sustained is a common-law penal obligation and shows upon its face a loan of two thousand dollars, an amount not within the jurisdiction of this court.

3. That said bond alleges and recites the performance of certain conditions and contingencies to be performed within nine years, to wit, the maturing of forty shares of stock and payment of interest on $2,000.00, and provides for its discharge upon the contingency of a maturity and surrender of said stock, and therein is a penal obligation not enforcible in equity.

4. That said bill shows that $500.00 interest and $1,200.00
14 on stock has been paid by defendant and shows that less than $2,000.00 are involved in this controversy.

5. That complainant nowhere alleges an amount in controversy of more than 2,000.00, except in paragraph 8 of said bill, which seek- the enforcement of a common-law penalty for some alleged default, which said penalty is non-enforceable in equity.

Wherefore defendant prays the court whether he be required to answer further.

T. E. CONN,
Solicitor for Defendant W. B. Luna.

I, T. E. Conn, solicitor and counsel in this court, do hereby certify that I believe the foregoing demurrer to be well taken in point of law.

T. E. CONN.

W. B. Luna, the above-named defendant, on oath says that the foregoing demurrer is not interposed for delay.

W. B. LUNA.

Signed and sworn to before me this M'ch 2, 1896.

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy*.

The foregoing has the following endorsement, to wit:

362. In equity. Building and Loan Association of Dakota *vs.* M. S. Price *et al.* Demurrer of W. B. Luna. Filed M'ch 2, 1896. J. H. Finks, clerk, by Chas. H. Leduum, deputy.

15 *Decree Dismissing Bill.*

Filed Mar. 17, 1896.

In the Circuit Court of United States in and for the Northern District of Texas, at Dallas.

BUILDING AND LOAN ASSOCIATION OF DAKOTA
vs.
M. S. PRICE *et al.*
No. 362. Equity.

Decree dismissing suit.

This cause having come on to be heard this 17th day of March, 1896, on a demurrer of the respondents to the bill of the complainants, in which demurrer the jurisdiction of the court is challenged, and the parties having been heard by their respective counsel, and the court being fully advised in the premises, it is ordered, adjudged, and decreed that the bill of the complainant herein be dismissed for want of jurisdiction of the subject-matter in controversy, but without prejudice, with costs to the defendants to be taxed; to which order and decree complainant then and there excepted; which exception is here allowed.

A. P. McCORMICK,
Circuit Judge.

The foregoing has the following endorsement, to wit:
Equity. No. 362. Building and Loan Association of Dakota *vs.* M. S. Price *et al.* Decree dismissing bill. Filed Mar. 17, 1896. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

16 *Complainant's Assignment of Errors.*

Filed Mar. 24, 1896.

In the Circuit Court of the United States in and for the Northern District of Texas, at Dallas.

BUILDING & LOAN ASSOCIATION OF DAKOTA
vs.
M. S. PRICE *et al.*

Complainant's assignment of errors.

Now, on this 18th day of March, 1896, came the complainant, by C. W. Starling, its solicitor, and says that the order and decree in said cause dismissing said complainant's bill for want of jurisdiction of the subject-matter in controversy is erroneous and against the just rights of complainant for the following reasons:

1st. The bill shows that this court had jurisdiction of the subject-matter in controversy.

2nd. The bill shows that the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars ($2,000.00).

3rd. The bill shows that the controversy is between citizens of different States.

Wherefore complainant prays that the said decree be reversed, and that this cause be remanded with instructions to proceed therewith.

C. W. STARLING,
Solicitor for Complainant.

The foregoing has the following endorsement, to wit:
Equity. No. 362. Building and Loan Association of Dakota *vs.* M. S. Price *et al.* Complainant's assignment of errors. Filed Mar. 24, 1896. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

17

Petition Praying Appeal.

Filed Mar. 24, 1896.

In the Circuit Court of the United States in and for the Northern District of Texas, at Dallas.

BUILDING & LOAN ASSOCIATION OF DAKOTA *vs.* M. S. PRICE *et al.* } Petition Praying Appeal.

The above-named complainant, conceiving itself aggrieved by the order and decree made and entered on the 17th day of March, 1896, dismissing the above-entitled cause for want of jurisdiction, does hereby appeal from said order and decree to the Supreme Court of the United States, as authorized by section V of the act of Congress of the United States approved March 3rd, 1891, and petitioner herewith files its bond in the penal sum of one hundred dollars, which bond is approved by Honorable A. P. McCormick, one of the judges of this court.

Petitioner prays that this appeal may be allowed; that the question of jurisdiction of this court may be certified to the Supreme Court of United States, as provided by law, and that all records, proceedings, and papers upon which said order and decree was so made, duly authenticated, may be sent to the Supreme Court of United States.

Dated Dallas, Texas, March 23rd, 1896.

C. W. STARLING,
Solicitor for Complainant.

The foregoing has the following endorsement, to wit:
Equity. No. 362. Building & Loan Association of Dakota *vs.* M. S. Price *et al.* Petition praying appeal. Filed Mar. 24, 1896. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

18 *Appeal Bond.*

Filed Mar. 24, 1896.

In the Circuit Court of the United States in and for the Northern District of Texas, at Dallas.

BUILDING & LOAN ASSOCIATION OF DAKOTA *vs.* M. S. PRICE *et al.* } Appeal Bond.

Know all men by these presents that we, The Building and Loan Association of Dakota, as principal, and C. W. Starling, as surety, are held and firmly bound unto M. S. Price, H. M. Price, Berthe Rothschild, and M. B. Luna in the sum of one hundred dollars, to be paid to the said M. S. Price, H. M. Price, Bertha Rothschild, and M. B. Luna, their heirs, executors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors, administrators, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of March, 1896.

The condition of the above obligation is such that whereas lately, at a circuit court in and for the northern district of Texas, at Dallas, Texas, aforesaid, in a suit pending in said court between The Building and Loan Association of Dakota, complainant, and M. S. Price and others, respondents, a final decree was rendered against the Building and Loan Association of Dakota, and the said Building and Loan Association having taken an appeal, which appeal has been allowed by the circuit court, to the Supreme Court of the United States to reverse the said decree in the aforesaid suit:

Now, therefore, the condition of this obligation is such that if the said Building and Loan Association of Dakota shall prose-
19 cute its said appeal to effect and answer all damages and costs occasioned to the said M. S. Price, H. M. Price, Bertha Rothschild, and M. B. Luna, if it fails to make its appeal good, then this obligation be null and void; otherwise to remain in full force and virtue.

Witness our hands this the 18th day of March, A. D. 1896.

BUILDING AND LOAN ASSOCIATION OF DAKOTA,
Per C. W. STARLING, *Agent.*
C. W. STARLING.

Approved March 24, 1896.

A. P. McCORMICK,
Circuit Judge.

The foregoing has the following endorsement, to wit:

Equity. No. 362. Building and Loan Association of Dakota *vs.* M. S. Price *et al.* Appeal bond. Filed Mar. 24, 1896. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

20 *Order Allowing Appeal.*

Filed Mar. 24, 1896.

In the Circuit Court of United States in and for the Northern District of Texas, at Dallas.

BUILDING AND LOAN ASSOCIATION OF DAKOTA *vs.* M. S. PRICE *et al.* } Order Allowing Appeal.

Upon consideration of the petition for appeal to the Supreme Court of the United States, filed herein by the complainant, Building & Loan Association of Dakota, it is ordered that said appeal be granted, bond therefor in the penalty of one hundred dollars having been executed and approved by the court. This appeal is granted solely upon the question of jurisdiction, and the question as to whether or not the circuit court has jurisdiction of the subject-matter in controversy is hereby certified to the Supreme Court of United States.

This appeal is prayed and allowed in open court at the term at which the judgment appealed from was rendered.

Dated this 24th day of March, A. D. 1896.

A. P. McCORMICK,
Circuit Judge.

The foregoing has the following endorsement, to wit:

Equity. No. —. Building and Loan Association of Dakota *vs.* M. S. Price *et al.* Order allowing appeal. Filed Mar. 24, 1896. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

21 *Certificate of Clerk.*

I, J. H. Finks, clerk of the circuit court of the United States in the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record, assignment of errors, and all the proceedings in cause No. 362, in equity, wherein Building and Loan Association of Dakota is complainant and M. S. Price and others are respondents, as fully as the same remains on file and of record in my office, at Dallas, Texas.

Witness my hand officially and the seal of said court, at Dallas, Texas, this the 8th day of April, A. D. 1896.

{ The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas. }

J. H. FINKS, *Clerk*,
By CHAS. H. LEDNUM, *Deputy.*

Endorsed on cover: Case No. 16,258. N. Texas C. C. U. S. Term No., 158. Building & Loan Association of Dakota, appellant, *vs.* M. S. Price *et al.* Filed April 17, 1896.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 158.

BUILDING AND LOAN ASSOCIATION OF DAKOTA,
Appellant,

vs.

M. S. PRICE, ET AL.,

APPEAL FROM THE CIRCUIT COURT OF UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF OF APPELLANT.

STATEMENT OF THE CASE.

This suit was instituted by the appellant, a South Dakota corporation, against appellees, citizens of Texas, to foreclose a deed of trust and vendors lien executed in its behalf, on real estate in the city of Dallas, Texas, the bill of complaint alleging $2800 and interest to be due on the lien. One of the defendants filed a demurrer to complainant's bill, challenging the jurisdiction of the court, on the ground that the matter in dispute did not exceed the sum or value of $2000, exclusive of interest and costs. This demurrer was sustained and the suit was dismissed for want of jurisdiction of the subject matter. An appeal was prayed for and granted, the circuit judge certifying the question of jurisdiction to this court. In the original transaction out of which this suit arose,

appellant advanced the mortgagor the sum of $2000. The only inquiry therefore, necessary to prosecute in order to determine the jurisdictional question involved, is whether such original transaction was solely one of borrowing and lending, and if so, whether either the $2000 premium, or the excess of liquidated damages provided for in the bond, and which is sought to be recovered, is interest within the meaning of the jurisdictional statutes of United States, and if so whether a subsequent assumption of appellant's lien, by a vendee of the real estate involved, in the full sum of $4000, created a vendors lien for such principal sum, so that the entire obligation was then to be treated as principal. Appellant prosecutes its appeal on the following

ASSIGNMENTS OF ERROR.

1. The bill shows that this court had jurisdiction of the subject matter in controversy.

2. The bill shows that the matter in dispute exceeds, exclusive of interest and costs, the sum of two thousand dollars ($2000).

3. The bill shows that the controversy is between citizens of different states.

ARGUMENT.

I.

1. The bond secured by the deed of trust is on pp. 2 and 3 of the transcript. It is in the penal sum of $4000, and recites that the mortgagor has bid in accordance with the by-laws of the appellant corporation the sum of $2000 as and for a premium for the acknowledged advancement to him of $2000, by way of anticipation of the value at their maturity of forty shares of the capital stock of said corporation, then owned by the mortgagor. It is conditioned that the mortgagor shall pay the appellant the sum of $24 on the first day of each and every month thereafter, as and for the monthly dues on said shares of stock until the said stock becomes fully paid in and of the value of $100 per share, and shall then surrender said stock to the appellant as security for the

faithful performance of the bond. It is also conditioned that the mortgagor will pay interest monthly at the rate of six per cent per annum on $2000. It further provides in case of certain default, the existence of which is charged in the bill, the sum of $4000 less whatever sum has been paid said association as and for the monthly dues on said forty shares of stock at the time of said default, may be enforced and recovered at once as liquidated damages, together with and in addition to the interest then due. The bill of complaint charges that the mortgagor accepted and received the said forty shares of stock according to the terms and conditions of a certificate issued by the appellant by which he agreed and promised to pay appellant on the first day of each and every month thereafter the sum of sixty cents for each and every share so held by him until such shares shall become fully matured and of the value of $100 per share. (Transcript p. 2, ¶ 2.) The bill set forth that $1200 for monthly dues has been paid. (Transcript, last ¶, p. 5.)

The original transaction was between a building and loan association and one of its members and share holders. The bond, therefore, contemplates a recovery for the failure to comply with the contract to make payments on the stock until it is worth $100 per share. Mr. Endlich in his Work on Building Associations,(Second Edition) Section 124, says:

* * * * * "On the part of the borrower, this new contract may, in general, be said to embrace the following essential features: (1) The member agrees to receive the advancement from the building association, and to allow it, for the privilege of the preference, a certain stipulated price, premium, or bonus. (2) He undertakes, and gives security in support of his undertaking, faithfully to perform, to the termination of the society's existence, or the running of a series, all the requirements of its constitution and by-laws relative to stock payments or dues, fines and other charges upon and respect to the shares held by him (which, as a rule, he pledges to the society as collateral security), and to be liable for and discharge all proper dues, assessments, contributions, and charges, arising upon them, in the same proportion and in the same manner as the

rest of the members; and, in addition, to make a fixed periodical payment by way of interest on his loan, either by that name, or in the way of a stipulated increase in the regular dues corresponding with the interest upon the loan. (3) He agrees, that upon the termination of the society, when its assets shall become distributable, it shall appropriate the proportion thereof accruing to such of his shares as were advanced to him to its own reimbursement, and the payment of the premium bid, if the society runs its full course, or to its reimbursement merely if it be prematurely dissolved by reason of insolvency. (4) He agrees, that in case of his failure at any time to perform the continuing conditions of his undertaking, for a certain period; or for such remissness in the payment of dues, etc., as would be ground of forfeiture of his shares as a member, the society shall be absolved from the necessity of waiting, until the period of dissolution, for its payment, but shall have the right to demand and recover it from him at once, including in the debt, not only the amount actually loaned, but all the payments and charges which may, lawfully, under his obligation as member and borrower be demanded of him: And also in case of failure of the association and a winding up before its purposes are accomplished, to make settlement at once for what may be found due from him to it."

In the same work, Section 80, page 67, it is said:

"Remembering that the borrower is a member, and not the less so for being a borrower; that, consequently, his liability for his share of the expenses is complete during the continuance of his membership;—it is clear, that, had he remained a member he might eventually have set off a portion of the profit accruing to him from the common fund, against his proportion of the common expenses. By becoming a defaulter, he simply loses the right or expectancy, and gains nothing in the way of shaking off responsibilities already incurred. Now his mortgage, if as is usual, conditioned for the faithful performance of his membership duties, includes, beyond question, that of sharing in the expenses of the society, and may be used by it for the purpose of enforcing such contribution. If however, not so conditioned in express terms, its use for that purpose would, upon principle seem equally justified where the mortgage contract is based upon and refers to the contract of membership. 'The two things are so intertwined that you can not separate the contract of membership from the contract of mortgage.' The two therefore, forming

in truth but one contract, its view is, of course, to be gathered by a comprehensive view of the whole, and if the contract of membership, imported into that of the mortgage, embraces a liability to contribute to losses, the doctrine that the contract of mortgage can be satisfied without compliance with the contract of membership, in so far as the latter affects the value of the borrowers stock interest as an offset to his indebtedness, seems to be reduced to an absurdity."

The obligation, therefore, is not solely for the return of the money advanced, together with the promised premium, but it is also for the faithful performance of a stockholder's liability—to pay his agreed stock subscriptions. The fact that he has become a borrower does not release him from his agreement to pay these subscriptions, neither does it exonerate his stock from its liability to sustain its pro rata share of the losses, if any, of the corporation. The bond may possibly be said to contemplate a termination of the relation of stockholder upon the election of the corporation to enter suit after default, but if so, it further contemplates that with such termination the shareholder, in consideration of being released from the liability of having his being held for unpaid subscriptions and his stock impaired by reason of lawful charges incident to expenses, losses, etc., agrees to pay the corporation a certain amount as liquidated damages. This agreement insures him that he will receive from his stock the amount which has been advanced or loaned to him, and that the payments on his stock, no matter what its value, together with the promised liquidated damages will be received in full settlement of all his obligations to the corporation. Mr. Endlich, in Section 129 of the work already quoted from, says:

"The true view of this indebtedness, in fact, is that the return of the money received, at any period intermediate between the time of taking it and the time of ultimate squaring accounts upon the expiration of the society, or series, is not contemplated by the contract. The money is never before that period intended to be collected, or repaid. The essential feature of the contract is the continued payment of certain dues; the incident the payment of interest as a compensation for the

use of money. Even where the obligation is given for the repayment of a specific sum of money, with interest, the character it would seem to derive from the fact, is modified and overcome by the provisions which may follow as to the payment or dues, etc., showing clearly the true intent of the transaction, or indeed, from the fact that it was in truth a transaction between the society and its member. Such, then, being the real nature of the borrower's undertaking,—to stand by the society to its end, and to continue throughout, certain stipulated payments,—it would appear that the very terms of the contract precluded any determination of its requirements before the period set by itself. There are certain judicial utterances that would seem to indicate such as the view first held. But it promptly became recognized that a method by which the borrower would substantially comply with the requirements of his contract, might absolve him from the literal fulfillment of it; i. e., that, having obligated himself to a long series of small payments, he might be allowed to substitute, in lieu thereof, a single larger one, equal, at once, to the aggregate of the smaller ones."

The relation of the contracting parties is, therefore, such that they may contract as to the amount of liquidated damages, and the excess of such agreed amount of damages above the amount advanced is therefore not an accessory demand to be treated solely as interest agreed to be paid for the use of a money loan, but it becomes an element of the principal demand arising out of the complex relations of the parties. To hold that the excess of $2000 is interest, would be to hold that appellant could not maintain an action in the Circuit Court seeking to recover on the original stock subscription, provided more than $2000 was due thereon. Under the charges in the bill that an agreement exists to pay this subscription in the form of monthly dues appellant has the right, in case of a breach to sue for the balance due on the original subscription. (See Endlich Id., Sec. 476.) Of course without an express agreement appellant could enforce payment for only these monthly dues actually in arrears, but by reason of the bond which authorizes suit to be maintained for the entire amount due, or for any specific sum as liquidated damages in lieu of the monthly payments, all sums, whether already due, or

to become due in the future, may be collected in one suit. This should be decisive of the question, and it is submitted that the judgment of the Circuit Court should be reversed and the cause remanded.

2. In the light of the following language in Section 130 of the work already quoted from, it may be doubted if, in the absence of any laws or rules governing the appellant corporation, the borrower, by the liquidated damage clause, can be deprived of an equitable right to make repayments,—either voluntary or involuntary—upon a basis far more favorable to him than provided in the bond. Mr. Endlich in the Section referred to says:

"The rule has been adopted in England, and recognized in America, that a borrowing member of a building association may redeem his property mortgaged, and discharge his indebtednes, to the same, upon payment of all future subscriptions which would accrue against him until the dissolution of the society, its probable duration to be ascertained by calculation, and the future payments to be treated as if immediately due."

There is, however, nothing in complainants bill which, upon application of the foregoing rule, would indicate that an amount less than $2000 is due on the stock. If the rule referred to were applicable in this suit, then its effect could be determined only after the defendants had answered and the probable duration of the series had been ascertained. The lack of jurisdiction by reason of the borrower claiming the right to apply the rule referred to could not, therefore, be determined upon demurrer.

3. But there are in this suit, rules and laws which govern the rights of the parties in case of repayment. The appellant pleads that it is a corporation duly and legally incorporated under and by virtue of the laws of the state of South Dakota. (Tr. p. 1.) The bond sued on purports to have been executed at Aberdeen, South Dakota, and recites that all payments thereon are to be made at appellant's home office in said city and state. (Transcript pp. 2 and 3.) The building and loan association laws in force in South Dakota in February, 1890, when the bond was executed, contain the following provisions:

"A borrower may repay his loan at any time by the

payment to the corporation of the principal sum borrowed, together with interest, not to exceed twelve per cent. per annum, * * * * * * or (and) in case the amount of premium bid for the priority of such loan be deducted in advance, and the repayment thereof is made before the expiration of the eighth year after the organization of the corporation; there shall be refunded to such borrower one eighth of the premium paid for every year of the said eight years unexpired; provided, that when the stock is issued in separate series, the time shall be computed from the date of the issuing of the shares of stock on which the loan was made; provided further, that when the series of stock has a less period than eight years to complete full payment thereof, there shall be refunded only pro rata for the unexpired term of the series; and provided further, when the by-laws of the corporation prescribe a different manner, and terms upon which the loan may be repaid, then the repayment can only be made in accordance with the by-laws of such corporation. (Laws of Dakota, 1887, Chapter 34, Section 4, page 83.) (Session Laws, South Dakota, 1890, Chapter 105, page 254.)"

In the absence of any facts authorizing the application of any different rule permitted or prescribed by the above statute, the eight year clause thereof would govern, in case of voluntary repayment of the obligation involved in this suit. Mr. Endlich, in Section 140 of the work already quoted from, says:

"* * * Under such provision, if he repays, when the society is four years old, it having still four years to run, he is entitled to an allowance, in reduction of the debt, amounting to one half of the premium at which he took the loan. In computing this allowance, however, only whole years can be counted, and no claim can be made for proportionate allowances for additional fractions of years unless provision is made therefor."

The loan under consideration purports to have been made in February, 1890. (Tr. p. 2.) The stock is alleged to have been issued in January, the same year. (Tr. p. 1.) The bill of complaint was filed October 3, 1895. (Tr. p. 6.) The loan had therefore run nearly six full years, leaving two years premium to be rebated. This entitles the mortgagor to a rebate of one fourth of the original $2000 premium, amounting to $500, which leaves $3500, from which deduct the $1200 stock dues

shown to have been paid, and, under the above rule, in the absence of any right on the part of the borrower to any part of the accrued profits on his stock, there still remains due and unpaid the sum of $2200 exclusive of interest. Conceding that the mortgagor is in position to invoke this statute to determine the amount due on his bond and it is clear that the amount in dispute is in excess of $2000, exclusive of interest and costs. It is, however, held in People's Ass'n vs. Belling (Mich.,) 62 N. W., 375, and in Mutual Ass'n vs. Tascott, (Ill.) 32 N. E. 377, that under statutes similar to the one quoted, the mortgagor, when sued on his obligation, can not avail himself of the rights accorded him in case of voluntary repayment. The application of the rule promulgated in these cases, is not, however, necessary to the determination of the question presented in the case under consideration.

4. In determining this question it is not necessary to discuss the law of usury as applicable to this class of contracts. An examination, however of the authorities touching usury may throw some further light on the character of the contract, and assist in determining whether the "premium" is interest. The term "usury" necessarily includes the term "interest." The same reasoning therefore, which determines whether building and loan association contracts in general are usurious, might determine whether the premium is interest. The laws of South Dakota. (Laws of Dakota. 1885, Chapter 34, Section 6, page 58), provide as follows:

"No premiums, fines, or interest on such premiums that may accrue to said corporation (Building and Loan Associations) according to the provisions of this act shall be deemed usurious; and the same may be collected as debts of like amount are now by law collected in this Territory."

Said laws (Session Laws of Dakota, 1889, Chapter 41, Section 3, pp. 60, 61) also provide:

"As building and loan corporations are aggregations of laborers, mechanics, workmen, and working women, which start without any paid up capital, and as these members only pay each month an assessment in proportion to shares, for the purpose of furnishing a home to

each of its members in turn, which assessment stops the moment that every member has thus been furnished with such home, these associations are declared to be benevolent institutions within the meaning of (certain laws exempting certain institutions from taxation) * * * * * * Shares issued by such association shall be exempt from taxation."

The Dakota laws herein referred to have never been construed by the Supreme Court of the State of South Dakota. The same laws, however, became part of the law of the State of North Dakota on the division of Dakota Territory and the admission of the two Dakotas into the Union. The Supreme Court of the State of North Dakota, in Vermont Loan & Trust Co. vs. Whithed, 49 S. W., 318, in considering these laws said:

"Under our statute the member has the right to pay his note at any time, and thus stop the interest, and in that case, would of course be entitled, on the dissolution of the corporation to receive the value of his stock in cash. But the effect of the transaction, generally speaking, is simply this: The association uses the fund to purchase the stock of that member who is willing to sell his stock in advance for the least money, and continue the payments on stock subscriptions until the value of the stock reaches par. It will be noticed that all the stock receives the benefit of the premiums paid, that of the party receiving the so-called loan, equally with that of the other stockholders, and the larger the aggregate premium the sooner the value of the stock will reach par, and the sooner the stated payments of stock subscription will cease. * * * * It seems very clear to us that the operations of building and loan associations, when confined to their own members, differ so radically from ordinary loan transactions that the legislature was clearly warranted in placing such associations in a separate class for the purpose of such legislation as pertains to interest and usury; and the classification being once established, the extent to which the classes shall be separated is purely a matter of legislative discretion. The legislature has the right to leave such associations untrammeled in the matter of premium paid for loans, and it has an equal right to leave them untrammeled in the matter of interest proper."

In the case of Richard vs Southwestern Assn, (La.) 21 Southern, 643, the contract involved was identical with the one before this court. In its opinion therein, the court says:

"A mere loan of $2000 would not be linked with a transfer of forty shares of stock to the borrower, imposing the burden on him of payment as well as entitling him to the benefits of a shareholder. * * * The plaintiff received the $2000; has had the benefit of it at 6 per cent. along with the rights conferred on him as a shareholder."

In a recent South Carolina case, Equitable Ass'n vs. Vance, 27 S. E., 276, in which the contract was similar to the one at bar, the Supreme Court of that State says:

"The circuit judge might have gone further, and held that even under the laws of this state, the contract was not usurious. Referring to the rate of interest charged, he says in the decree: 'It is not more than six per cent., because $7.50 per month is exactly six per cent. of $1500. The other payments are independent of the loan and had to be made whether a loan was made or not.' Here he touched the very marrow of the matter, when he indicated that the payments made by the defendant referred to two distinct transactions, which should not be blended."

II.

There is such a substantial difference between the "premium" of this transaction, and interest in the ordinary acceptation of the latter term, that it seems unnecessary to resort to any technical definitions to show that this "premium" is not interest. It is, however, submitted that the term "premium" in building and loan association law has a meaning which is as technical as the same term applied to either the law of insurance or to the value of stocks and bonds. Mr. Endlich, in Sections 399 and 400 of the work already so freely quoted from, says:

" 'The premium is a bonus charged to a stockholder wishing to borrow, for the privilege of anticipating the ultimate value of his stock, by obtaining the immediate use of the money his stock will be worth at the winding up.' The liquidation of this charge is contemplated in one of two ways. Either (1) the borrower agrees to relinquish to the society a certain proportion of the par value of each share bought out, the association presently handling over to him the difference. * * * * * The former method is the gross premium plan, the orig-

inal and interminating and serial societies probably the prevailing one."

"In effect the gross premium is the conventional difference between the par value of the share advanced, and the amount actually received by the borrower. It is not, therefore, a cash payment which he is obliged to make upon obtaining his preference; nor can it properly be said to be a deduction made at the time from any money belonging to him. Its true nature appears most clearly where the form of the transaction is that of a sale to, and redemption by, the society of the shares held by the member, which indeed, appears to be the oldest method."

The bond in the suit at bar recited (Tr. p. 3.):

"Whereas, said Jacob Rothchild has bid, in accordance with the by-laws of said association, the sum of $2000 as and for a premium for the advancement to him by said association of $2000 by way of anticipation of the value at their maturity of the the forty shares of the capital stock, etc."

The bill charges (Tr. p. 2) that the mortgagor made application for said advancement in anticipation of the maturity value of said shares, and that in competition with other bidders for the funds of appellant he bid as a premium for the privilege of obtaining such advancement the sum of $50 per share. The laws of South Dakota, (Laws of Dakota, 1887, Chapter 34, Section 3, page 82,) define the term premium in the following provision:

"The officers shall hold stated meetings at which the money in the treasury shall be offered for loan in open meeting and the stockholder who shall bid the highest premium for the preference or priority of loan shall be entitled to receive a loan for the full amount of each share of stock held by such stockholder."

Interest is compensation paid, or agreed to be paid for the loan, use or forbearance of money.

Premium in building and loan association law is the discount which the borrower makes on his shares for the privilege of realizing on them immediately.

III.

The bill of complaint charges that the original mortgagor conveyed the mortgaged premises to the defendant Sophia Miller, who, as a part of the purchase price

therefor, assumed and agreed to pay the aforesaid bond, in the sum of $4000, secured by the aforesaid deed of trust lien, retaining a vendors lien in the said deed of conveyance to secure the payment of the said sum of $4000." (Tr. p. 5, Original p. 9.)

In Texas a vendor's lien is recognized and is enforceable, and when retained by a vendor who is also a mortgagor, it inures to the benefit of the mortgagee. Texas Land & Loan Co. -vs. Watkins, 34 S. W., 996. The assumption as pleaded therefore gave the vendor, who was the original mortgagor, a lien in the principal sum of $4000, and the vendee is, by such assumption estopped from denying the validity or existence of the mortgage or that there is $4000 due thereon. (Jones on mortgages, Fifth Edition, Section 744.)

It is therefore respectfully submitted that the judgment of the Circuit Court should be reversed and the suit remanded for further proceedings therein.

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C. W. Stanley

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No. 158.

Brief of Simkins for Appellee

Filed Dec. 2, 1897.

No. 158.

Supreme Court of the United States,

October Term, 1897.

Building and Loan Association of Dakota,
Appellant,

vs.

M. S. PRICE, Et Al.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR APPELLEE.

THE SAMUEL JONES COMPANY, DALLAS.

No. 158.

Supreme Court of the United States,

October Term, 1897.

Building and Loan Association of Dakota,
Appellant,

vs.

M. S. PRICE, Et Al.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR APPELLEE.

There is no Federal question involved in the record before this Court. The questions for the Circuit Court were: 1st. Does the bill show more than $2,000.00 in controversy, exclusive of interest and costs. 2d. Does the bill show any facts sufficient to invoke any consideration in equity?

Here the bill exhibits a contract, the material facts recited in which this Court must judicially know to be false, because the geographical separation of Dakota and Dallas render their *truth* impossible, except upon the theory that the whole blank formula were *with* and filled up by the Dallas agent.

The conditions of the bond are *impossible* of performance, and therein the bill shows upon its face that

performance was not contemplated by appellant at the time of execution, and that the whole was but a device to disguise the real transaction, which was a simple loan of $1,756.00, because the bill makes the by-laws a part, and they require (a fact undisputed) $204.00 off, and $40,00 membership fee, thus withholding $244.00 from the $2,000.00 it alleges

The bill alleges (p. 1 Record) on January 1st, 1890, an application for membership, subscription for stock, an *issue* of stock and payment of subscription or admission fee on 3rd page of bill, p. 2 Record, it alleges on said 1st day of January, 1890, an application for advancement of $2000. and a bid as a premium of $50. per share of stock and offered the real estate in Dallas, Texas, as security. The bill shows all these alledged cotemporaneous acts were in fact but one *act*, a mere formula required by appellant as a condition precedent to a loan. Page 4 alleges a $4000. bond which shows a premium of $2000. bid in accordance with the by-laws (a copy which by the allegations of the bill it is proper for the Court to consider) which shows on page 12 under the head of "loans" that six full monthly payments were deducted, which, with $40. membership fee, reduced the actual loan to $1756.

This bond executed February, 1st, 1890, shows a *sale* and assignment to appellant of the 40 shares of stock (p. 3 Record, par. 5.) conditioned to pay $4000. in 9 years with interest on $2000 at 6 per cent. equals $5,080; or to pay monthly in advance, interest on $2,000, equals $10. and $24. as stock dues, until the stock payments equals $100. per share, 40 shares equals $4,000; and shall then *surrender* said stock to appellant, in default of which performance the whole amount shall become due as *liquidated damages*. To mature

the stock, requires by the terms of the bond 13 years, 10 months and 20 days; during which time interest on $2,000. at 6 per cent. equals $10. per month must be paid, equals $1,566.66 interest, aggregating $5,566.66 to be paid for the use of $1,756.

The bill nowhere alleges any possession, ownership, control of, or beneficial interest by Rothschild in the stock after the loan, nor, that it had any value or could become of any value until matured by *payment to par*, when it dies by the act of its creation. It has been *sold* to appellant and is surrendered to it upon maturity. It has no real, tangible, appreciable existence. It is apparent upon the face of the bill as a fictitious coffer or receptacle for profit for use and forbearance of a loan of $1,756.

No facts are set up in the bill by which appellant could suffer any damage except from the detention of the loan, and there is no allegation that simple interest would not, most abundantly, repair that. The question was not one of usury, or who may plead it, but whether such extraordinary exactions as are exhibited in the bill are not now and have always been held by the United States Courts to be interest, whether the premium was in the nature of interest, the bill shows payment of $1,200 *stock dues* and $500 interest, equaling $1,700, and nowhere alleges that the return of $1,700 of the $1,756 gave any *value* to the stock.

On page 6 of the Record the bill shows that C. S. Crysler was a citizen of Dallas, Texas, as well as all the parties except appellant.

The bargain shown in the bill is too unconscionable to be enforcable in equity.

In support of the proposition that the premium of $2,000 in this bill is interest, we cite the following au-

thorities: (Sec. 6, page 57, Laws of Dakota), "no premiums, fines or interest shall be deemed *usurious.*" There are no usury laws in Dakota, and this Statute shows the legislative construction to be that the *premium* is *interest.* In Fowler v. Equitable Trust Co. 141 U. S., p. 384, on page 404 the Court say: "The Statute cannot be avoided by any device or shift." On page 405 "we therefore hold that the exaction by the Trust Company's agent, pursuant to his general arrangement with it, of commissions over and above the ten per cent. interest stipulated to be paid by the borrower, rendered the contract usurious." Here the *commission* is by the highest authority held to be interest.

On page 406 *idem*, the Court say "a borrower being sued may have all interest payments applied in diminution of the principal sum."

In Miller v. Tiffany, 1 Wall 298, the Court say on page 310 "the parties must act in good faith and not disguise the real character of the transaction."

In Andrews v. Pond, 12 Peters 65, on page 76 the Court say: "If any part of the 10 per cent. exchange was intended as a cover for usurious interest, the form in which it was done will not protect the bill from the consequences of usurious agreements."

In Bank v. Owens, 2 Peters 535 to 536, the Court say: "Accepting depreciated Kentucky bills as a loan at par is usurious interest."

In Missouri Valley Ins. Co. vs. Kittle et al, 2 Fed. R., on page 114, the Court say: "The charge of usury, says Mr. Tyler, in most instances, attaches to pretended cases of exchange of credits or commodities, or when a profit is realized for something else besides the

use of money loaned or debt forborne." (Tyler on Usury, p. 105.) The disguise here was life insurance.

In Krumseig et ux vs. Missouri, Kansas, &c., 77 Fed. Reporter, p. 32, the disguise was life insurance. The Court held, in both cases, the premiums paid were interest on a loan. The transactions are similar to the bond in this bill, but less onerous. Tyler ou Usury, p. 83: "And, perhaps, it might be added, that when a contract is made payable at a place other than the residence of either of the parties, and foreign to the subject matter of the contract, and a higher rate of interest is contracted for than the laws of the place permit, the parties will be presumed to have intended a fraudulent evasion of those laws."

In Griffin vs. Building and Loan Ass'n of Dakota, 39 S. W. Reports, p. 659: Considering a bond identical with the one on which this bill was brought, the Supreme Court of Texas say: "The fact that the contract expresses that the money borrowed is to be paid in Dakota, is met by the real, substantial provisions for its enforcement in Texas, and the circumstances under which the business was transacted with such overwhelming force that we are brought to the conclusion that the contract, so far as it provided by its terms for the payment of the money in Dakota, was simply a device to evade the laws of this State, and these facts are so manifest from the face of the papers themselves, that it ceases to be a question of fact, but becomes a matter of law. The contract was made with a view to its enforcement in Texas."

In Simpson v. Kentucky Citizens Building & Loan Association, 41 Southwestern Report 570, the Court say: "The dues and premiums we have invariably held to be interest." On page 573, for the plain words

borrow, loan and interest, "sale," "advance," "bonus" and "premium" are substituted.

In Mills v. Association, 75 N. C. 299, the Court said: "calling a borrower a "partner," or substituting "redeeming" for "lending," or "premium" for "bonus," or "dues" for "interest," and such like subterfuges will not avail."

It is most respectfully submitted that the "premium" in this bill is *interest* pure and simple, and the stock wholly fictitious, having not one single indicia of real tangible appreciable existence as property; it is a device pure and simple, both of which facts are apparent upon the face of the bill.

In Lloyd v. Scott, 4 Peters 205, on page 230 the Court say "the purchaser of the property charged with the annuity may plead usury; the annuity was the concealment of usury. This is the law in Texas.

The case of Vaughn, 36 Southwestern Report 1014, the Court say: "Vaughn having paid no part of the purchase money, the plea of usury could not avail him to set aside the sale.

It is respectfully submitted the judgment of the Circuit Court is sustained by the overwhelming weight of authority, English and American, State and Federal.

W. S. SIMKINS,
for Appellees.

T. E. CONN, of Counsel.

BUILDING AND LOAN ASSOCIATION OF DAKOTA v. PRICE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

No. 158. Submitted December 9, 1897. — Decided January 10, 1898.

The court below having dismissed the bill in this case on the ground that it had no jurisdiction, as the matter in dispute was determined not to exceed $2000 exclusive of interest and costs, this court examines the bill at length in its opinion, and holds that upon the face of the pleading the matter in dispute is sufficient to give the court below jurisdiction, and remands the case for further proceedings, without determining any of the other questions on the merits.

THE case is stated in the opinion.

Mr. J. H. Hauser and *Mr. C. W. Starling* for appellant.

Mr. W. S. Simkins and *Mr. T. E. Conn* for appellees.

MR. JUSTICE PECKHAM delivered the opinion of the court.

The appellants herein commenced this action against the defendants in the Circuit Court of the United States for the Northern District of Texas, the complaint in which was filed on the 3d of October, 1895. The defendants demurred on the ground that the court had no jurisdiction of the several subjects-matter set forth in the complaint, one of the objections being that the matter in dispute did not exceed $2000 exclusive of interest and costs.

The cause was heard in the Circuit Court, the demurrer was sustained, and the bill dismissed with costs and without prejudice, for want of jurisdiction of the subject-matter in controversy. The complainant appealed to this court, which appeal was allowed and granted solely upon the question of the jurisdiction of the Circuit Court, and that question alone

has been certified. Whether the bill shows facts sufficient to invoke the consideration of a court of equity is not such a question of jurisdiction as is referred to in the Judiciary Act of March 3, 1891, c. 517, and we have therefore no concern with that question. 26 Stat. 826, § 5; *Smith* v. *McKay*, 161 U. S. 355.

The decision of the only question before us depends upon whether the allegations contained in the bill of complaint show the matter in dispute to be of sufficient value to give the Circuit Court jurisdiction.

The appellant was incorporated under the laws of the State of South Dakota, and has its principal place of business in the city of Aberdeen, in that State. The action was brought for the purpose of recovering the amount of an alleged debt, damages and costs against the defendants Price, Rothschild and Miller, and for a decree of foreclosure against the defendants H. M. Price and W. B. Luna, under a certain mortgage and vendor's lien on the premises described therein.

The bill alleges, among other things, that on the first of January, 1890, one Jacob Rothschild applied for membership in the complainant's association and subscribed for forty shares of its capital stock, which application was accepted, and on that day a certificate for forty shares of the capital stock was issued and delivered to him, and he paid the application or subscription fee due thereon, and the stock was accepted and received by him upon the terms and conditions therein set forth, and he thereupon became a member of the association and the holder and owner of forty shares of its capital stock.

The bill then proceeds as follows:

"3d. Your orator further shows that on or about the said first day of January, 1890, the said Jacob Rothschild, being then and there a stockholder in your orator and entitled under the rules, regulations and by-laws to make application for an advancement on his said stock, made his application to your orator for an advancement of two thousand dollars in anticipation of the maturity value of his said forty shares of stock, and in competition with other bidders for the funds of your

orator bid as a premium for the privilege of obtaining such advancement the sum of fifty dollars per share and offered as security for the continued payment for the monthly dues on said forty shares of stock and the interest on said advancement the real estate hereinafter described; and your orator further shows that said application and bid were made in accordance with the rules, regulations and by-laws of said association, and were duly accepted and approved by your orator's board of directors, and the advancement applied for was duly made, and the amount due thereon was duly paid to the said Jacob Rothschild; that said advancement was made by your orator on the faith and in the expectation that the said Rothschild would, according to his agreement, continue the monthly payment on his said forty shares of stock until such stock should have become fully matured and of the value of one hundred dollars per share.

"4th. Your orator further shows that on or about the first day of February, 1890, the said Jacob Rothschild and the defendant, Bertha Rothschild, for and in consideration of the advancement so made and for the purpose of securing the continued payment of the monthly dues on said stock, made, executed and delivered to your orator, and thereby promised and agreed to comply with the terms of a bond, of which the following is substantially a copy:

"'Know all men by these presents, that Jacob Rothschild and Bertha Rothschild, his wife, of the county of Dallas, and State of Texas, are held and firmly bound unto the Building and Loan Association of Dakota, of the city of Aberdeen, and State of South Dakota, in the sum of four thousand ($4000) dollars, lawful money of the United States of America, to be paid to the said association, its certain attorney, successors or assigns, at its home office in Aberdeen, South Dakota, to which payment, well and truly to be made, we bind ourselves and our heirs, executors and administrators, jointly and severally, firmly by these presents.

"'Sealed with our seals, and dated at Aberdeen, South Dakota, this first day of February, one thousand eight hundred and ninety.

"'The condition of this obligation is such that, whereas, said Jacob Rothschild has bid, in accordance with the by-laws of said association, the sum of two thousand ($2000) dollars, as and for a premium for the advancement to him by said association of two thousand dollars, by way of anticipation of the value, at their maturity, of forty shares of the capital stock of said association, now owned by said Jacob Rothschild and, whereas, said association has this day advanced to said Jacob Rothschild the sum of two thousand dollars, in consideration of said premium, and by way of said anticipation:

"'Now, therefore, if the above bounden Jacob Rothschild and Bertha Rothschild, their heirs, executors and administrators, or any of them, shall well and truly pay or cause to be paid unto the said association, its certain attorney, successors or assigns, at its home office, on or before nine years from date hereof, the just sum of four thousand dollars as aforesaid, together with interest on two thousand dollars, at the rate of six per cent per annum, from the first day of February, A.D. 1890, until paid, payable monthly in advance; or shall well and truly pay, or cause to be paid, unto said association, its certain attorney, successor or assigns, at its said home office, the sum of twenty-four and $\frac{00}{100}$ dollars on the first day of each and every month hereafter, as and for the monthly dues on said forty shares of capital stock of said association now owned by the said Jacob Rothschild, and by him hereby sold, assigned, transferred and set over to said association as security for the faithful performance of this bond, and shall also well and truly pay, or cause to be paid, all instalments of interest aforesaid, and all fines which become due on the said stock, without any fraud or further delay, until said stock becomes fully paid in and of the value of one hundred dollars per share, and shall then surrender said stock to said association; then, and in either of such cases, the above obligation to be void, otherwise of full force and virtue.

"'Provided, however, and it is hereby expressly agreed, that if, at any time, default shall be made in the payment of said interest, or the said monthly dues on said stock, for the space

of six months after the same, or any part thereof, shall have become due, or if the taxes and assessments on the property mortgaged to secure the faithful performance of this bond be not paid when due, or if the insurance policy or policies on the said mortgaged property be allowed to expire without renewal, then, and in either or any such case, the whole principal sum aforesaid shall, at the election of said association, its successors or assigns, immediately thereupon become due and payable, and the sum of four thousand dollars, less whatever sum has been paid said association, as and for the monthly dues on said forty shares of said capital stock, at the time of said default, may be nforced and recovered at once as liquidated damages, toge r with and in addition to, all interest and fines then due, d all costs and disbursements, including said taxes, insura e and assessments, which have been paid by said association, anything hereinbefore contained to the contrary notwithstanding.

"'JACOB ROTHSCHILD. [SEAL.]

"'BERTHA ROTHSCHILD. [SEAL.]

"'Signed, sealed and delivered in presence of —

"'W. L. HALL.

"'C. S. CRYSLER.'

"5th. Your orator would further show that, on the first day of February, 1890, the said Jacob Rothschild and the defendant Bertha Rothschild, in order to better secure your orator for the money advanced by your orator as aforesaid and in all their agreements, obligations and contracts as aforesaid, made, executed and delivered to your orator their certain mortgage or deed of trust, with power of sale, in which Charles S. Crysler was made trustee on the following described tract or lot of land, situated in the city of Dallas, county of Dallas, and State of Texas, and more particularly described as follows:

(Here follows description of property.)

"6th. Your orator would further show that it is recited in said deed of trust, among other things, that the said Jacob Rothschild is a member of the Building and Loan Association

of Dakota, and is the owner of forty shares of the capital stock thereof, the monthly payments of which amount to $24.00; and it is further recited that said deed of trust is given for the purpose of securing the aforesaid bond, the nature of which bond is fully set forth in said deed of trust.

"7th. Your orator would further show that it is stipulated in said deed of trust that if the said defendants shall well and truly pay or cause to be paid the sum of four thousand dollars, together with the interest above specified, within the time and in the manner as in said bond specified, or shall pay or cause to be paid, at the home office of said association, the instalments of interest as they become due on said stock, until said stock becomes fully paid in and of the value of one hundred dollars per share, and before any of said instalments of interest or monthly payments shall have been past due for a period of sixty (60) days, and shall then surrender said stock to said association in payment of said bond, and shall pay the taxes and assessments and shall keep and perform all and every of the conditions of said bond, then this deed shall be void and the property hereinbefore conveyed shall be released at the cost of the parties executing the said bond, but otherwise to continue in full force and effect; but if default be made in the payment of said sum or sums of money or any instalment of interest thereon or of any monthly payment of stock for the period of sixty (60) days after the same shall be due, or any part of either, or in the payment of taxes at the time or times specified for payment, or in any condition in said deed of trust contained, then or in either or any such case the whole principal sum or sums secured by this trust deed and the interest thereon accrued up to the time — such default shall, at the election of your orator, its successors or assigns, or its or their agent, become thereupon due and payable immediately upon said default. Whereupon the trustee in said trust deed is authorized and empowered to sell said premises in accordance with the stipulations contained in said instrument, and with the proceeds of said sale to pay the expenses of sale and all sums of money due by the terms of said bonds so in default, with all interest due thereon, and all taxes, if any, due to said association.

"8th. Your orator further shows that said forty shares of stock have not been withdrawn, nor have they matured or become of the par value of one hundred dollars per share; that subsequent to the execution, delivery and record of the aforesaid deed of trust the said Jacob Rothschild and Bertha Rothschild conveyed the aforesaid premises to the defendant Sophia Miller, who, as a part of the purchase price for said premises, assumed and agreed to pay the said bond in the sum of four thousand dollars, secured by the aforesaid deed of trust lien, retaining a vendor's lien in said deed of conveyance to secure the payment of the aforesaid sum of four thousand dollars; that subsequently the said Sophia Miller conveyed said premises in like manner to the defendant M. S. Price as her separate property, who, as a part of the purchase price therefor, assumed and agreed to pay said bond secured by said deed of trust lien, said Sophia Miller retaining a vendor's lien for the payment thereof and for the payment of other portions of the purchase money, by virtue of which she may claim some interest in the aforesaid premises; that W. B. Luna also claims some interest in the aforesaid premises, which interest, if any, is subsequent and inferior to that of your orators.

"Your orator further alleges that it is now the owner and holder of the said bond and deed of trust. Your orator further shows that the said defendants have not paid said principal sum of $4000, nor any part thereof; that the said defendants have not continually paid the monthly dues on said forty shares of stock, nor the monthly instalments of interest as provided in said bond, but that defendants have paid no part of said dues or interest except the sum of twelve hundred dollars ($1200) as and for the said monthly dues for the month of February, 1890, to and including the month of March, 1894, and the further sum of $500 as and for the interest, as in said bond provided, for the month of February, 1890, to and including the month of March, 1894.

"Your orator further shows that default has been made in the payment of the monthly dues on said forty shares of stock and the monthly instalments of interest on said ad-

vancement; that more than six months have elapsed since the first monthly instalment of interest and dues so in default became due and payable, and your orator elects to declare the whole sum named in and secured by said bond and deed of trust to be immediately due and payable.

"9th. Your orator further shows that there is now due and owing your orator from Bertha Rothschild, Sophia Miller, H. M. and M. S. Price under and by virtue of the terms of said bond the sum of four thousand dollars, ($4000,) less the sum of twelve hundred dollars, ($1200,) paid to your orator as the monthly dues on said forty shares of capital stock at the time of the aforesaid default, aggregating $2800, together with and in addition to interest on two thousand dollars, at the rate of six per cent per annum, from April 1, 1894."

The complainant then prays for a decree against defendants for the amount of the above-named debt, damages and costs, and for a decree of foreclosure of the mortgage above set forth.

We think upon the face of this pleading the matter in dispute exceeds the amount of two thousand dollars, exclusive of interest and costs. Act of August 13, 1888, 25 Stat. 433, c. 866.

The by-laws of the complainant are not made a part of the bill and they cannot be referred to for the purpose of aiding or marring the pleading itself. In truth, they are not in the record, and we are ignorant of their contents, except as some matters set forth in the bill are alleged to be in conformity with certain of their provisions. Nor can the inference be indulged, on a question of jurisdictional amount, that the whole scheme is a mere cover to conceal an usurious exaction of interest for the loan of a sum of money not exceeding in any event $2000. No such legal inference arises from the facts stated in the bill. On the contrary, it appears on the face of the bill that the company was duly incorporated by legislative act; that Rothschild, the original owner of the stock, applied for membership in the company, subscribed for forty shares thereof, and promised to pay for it in the manner stated. We cannot assume, as a matter of legal inference,

that the circumstances set forth in the bill constitute a cover for usury, and we must take those allegations as they are made and assume their truth for the purpose of our decision.

The bill shows an application to complainant for an advance of $2000 in anticipation of the maturity value of the shares of stock owned by Rothschild; that the application was granted and the advance applied for duly made and the amount paid to Rothschild, and that it was made on the faith and in the expectation that he would, according to his agreement, continue the monthly payments on his stock until it became fully matured and of the value of one hundred dollars per share. The bond given as part security for the repayment of this advance contains distinct contracts. The obligor agreed to pay in nine years from the date thereof $4000, and interest on $2000 at six per cent from February, 1890, until paid, the interest being payable monthly in advance; or, instead of this payment, he agreed to pay $24 on the first of every month at the home office of the company as monthly dues, being at the rate of sixty cents per month on each share, there being forty shares of stock, and he agreed to continue these payments until the stock became fully paid up and of the value of $100 per share, when he was to surrender it to the company, and he agreed also to pay the interest as stated above.

We cannot assume, as against the allegations contained in the bill, that the payment of these monthly dues upon the contract was pursuant to an agreement to pay interest on the loan, and that such payment was merely another name for interest. It is alleged to be separate and distinct from that, and it is set up as a material portion of the obligation of the borrower who, by subscribing for the shares and being accepted, etc., thereby became a shareholder and entitled to dividends and profits coming to the shares he held. Upon default in either of these distinct obligations, to pay interest and to also pay his monthly dues, the whole sum at the option of the association became due less whatever sum had been paid it as the monthly dues at the time the default might be enforced. The bill here shows that there had been a default

for six months, and that there was due from defendants at commencement of suit the sum of four thousand dollars, less the sum of twelve hundred dollars of monthly dues which had been paid up to and including March, 1894, leaving due the sum of $2800, together with and in addition to the interest on $2000, at the rate of six per cent per annum, from April, 1894.

The matter in dispute, therefore, is not merely $2000 money loaned, together with the interest on that sum, but the claim on the part of the complainant is for the payment of the principal sum above stated, which exceeds the sum of $2000, exclusive of interest and costs. All these facts are admitted by the demurrer.

The nature of this association is not very clearly set forth in the bill, but it is probably not materially different from those which have been incorporated to a great extent in many different States, and referred to generally in Endlich in his work on Building Associations.

A question somewhat similar to this has been decided in *Richard* v. *Southwestern Building & Loan Association*, 21 S. R. 643, (49 La. Ann.,) where it was held that a loan of this nature was not to be treated as usurious, for the reason that the payments supposed to constitute the usury were by the terms of the contract made upon the stock debt and not upon the loan. To the same effect is *Equitable Building & Loan Association* v. *Vance*, 27 S. E. Rep. 274, Supreme Court of South Carolina, May, 1897.

The stock is not, as is claimed by counsel for appellee, a mere fiction. It is issued, it is to be assumed on this appeal, in accordance with the provisions of the charter of the complainant, and the owners of it are entitled to share in the profits of the corporation, which it is supposed it will be enabled to make during its existence, and his position of shareholder is entirely separate from his position of borrower from the company.

Without determining any of these questions on the merits, we think the matter in dispute was within the jurisdiction of the Circuit Court, and we therefore reverse the judgment

dismissing the bill, and remand the case to the Circuit Court with directions to take such further proceedings as may be in conformity with this opinion.

Reversed.